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FEBRUARY 23, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Limberg, on behalf of himself and all others similarly situated,	)	
	)	**Supreme Court Case No. 20150348**
Plaintiff and Appellant,	)	
vs.	)	
	)	
Sanford Medical Center Fargo, a North Dakota Corporation, Sanford Health Network North, a North Dakota Corporation, Sanford North, a North Dakota Corporation, and Sanford, a North Dakota corporation; and does 1 Through 25, inclusive,	)	
	)	
Defendants and Appellees.	)	

BRIEF OF APPELLANT DUSTIN LIMBERG

APPEAL FROM JUDGMENT GRANTING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED DATED OCTOBER 28, 2015, CASS COUNTY DISTRICT COURT EAST CENTRAL JUDICIAL DISTRICT THE HONORABLE THOMAS R. OLSON

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STATEMENT OF THE ISSUES

[1] Whether a hospital's emergency department's admission agreement form, which makes a patient financial responsible for "all charges related to services provided", without specifying how such charges are to be determined contains a definite pricing term.

STATEMENT OF THE CASE

[2] Plaintiff, a former emergency room patient of Sanford Hospital, brought a Complaint against Defendants, pursuant to North Dakota Century Code Chapter 32-23, seeking resolution of a dispute over the interpretation of the "Financial Responsibility Provision" in Defendant's one page form Contract (See Exhibit A) and specifically the word "charges." The Declaratory relief sought would clarify the legal rights and duties of the parties under the Contract.

[3] In response to the Complaint, Defendants filed a Motion to Dismiss for Failure to State a Claim upon which relief can be granted. After hearing, the court issued an Order of Dismissal in which it concluded that "no ambiguity exists regarding the price term of the Contract," and as a result "the Complaint has failed to allege facts, taken as true, presenting a justiciable controversy upon which the Court can render a declaratory judgment either terminating the controversy or removing an uncertainty." This time appeal followed.

STATEMENT OF THE FACTS

I. The Complaint alleges the lack of any pricing term

[4] As set forth in the Complaint, Sanford bills uninsured patients, subsequent to

discharge from the hospital, in accordance with its internally developed Charge Description Master. Although the Contract contains no mention of Sanford's Chargemaster rates or any other rate schedule, and there is nothing in its financial responsibility provision that differentiates uninsured patients from any other patients presenting at its emergency facilities, Sanford nevertheless claims that the reference to "all charges" in its Contract is an "unambiguous" reference to the charges contained in its internally developed and totally unmentioned Chargemaster rate schedule. This self-serving interpretation is unsupported by well-established rules of contract construction and interpretation and logically flawed. The fact that Medicare, Medicaid, and Insured patients all sign the same Contract as Plaintiff, but are subject to separate rate schedules not contained in the Contract, [1] makes it logically absurd to interpret Sanford's Contract as an unambiguous agreement to pay for all services rendered during the hospital visit at Sanford's Chargemaster rates, particularly since that conclusion is knowingly false for almost all emergency care patients and clearly not even applicable to health care providers other than Sanford.

[5] The failure of the Contract to identify or define the term "all charges," and the logical flaw in interpreting the term "all charges" as an unambiguous reference to Sanford's Chargemaster rates, in ¶¶ 15 of the Complaint as follows:

> *The Contract fails to identify, describe, or in any manner define what is meant by "all charges related to services provided by Sanford" and fails to identify any location where any such "charges" can be found. Furthermore, the actual*

[1] As acknowledged by the court below, Medicare, Medicaid, and Insured patients are subject to governmental and negotiated rate schedules which the Court describes as "separate agreements" found outside the body of the Contract.

> *pricing terms that determine the reimbursement rates of the hospital vary by category of patient, and there are, in fact, no regular "charges" of the hospital. For example, rates for commercially insured patients are found in privately negotiated contracts, and rates for Medicare, Medicaid, and Workers' Compensation patients are contained in various governmental regulations, all of which are independent from Sanford's Chargemaster rates. The fact that all patients, regardless of category, are subject to the exact same pricing agreement to pay "all charges related to services provided by Sanford", and the fact that each category of patients is charged based on separate rate schedules not contained within the Contract, conclusively shows that the term "all charges related to services provided by Sanford," as a pricing term for the hospital's services and treatment, is inherently vague, ambiguous, and meaningless.*

II. Defendant's Motion to Dismiss is without merit

[6] Sanford filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, arguing that the financial responsibility provision in question "unambiguously refers to the established rates of the Defendants."[2] This argument is without merit. Simply put, the intent to charge self-pay patients, or any other patients, based on rates set forth in Sanford's Chargemaster does not appear anywhere in the Contract. Further, the plain meaning of the word "charges" has nothing to do with the word "Chargemaster," which is a term of art virtually unknown to the general public.

[7] The Court, after failing to perform a proper analysis of the disputed provision or even mentioning North Dakota law regarding the interpretation and construction of written

[2] Defendant has no established payment rates for emergency care patients, as shown by the fact that payment rates for services rendered vary widely from patient to patient. Plaintiff alleges that he was billed based on an unknown rate schedule which was not referenced or mentioned in the Hospital's contract.

documents, stated that "there was no dispute that the Contract refers to Sanford's pricing guidelines, which are the Chargemasters," and concluded that "no ambiguity exists regarding the price term of the Contract." Continuing, the court below found that Plaintiff is not entitled to a Declaratory Judgment under North Dakota Century Code Chapter 32-23, because "the Complaint has failed to allege facts, taken as true, presenting a justiciable controversy upon which the Court can render a declaratory judgment either terminating the controversy or removing an uncertainty."

III. The Complaint seeks an interpretation of the word "charges" as it appears in Sanford's contract

[8] The word "charges" is the key word around which the dispute is focused. The word "charges" appears eight times in the first three paragraphs of Sanford's Contract, but the Contract gives no hint that the word "charges" is a reference to the prices contained in Sanford's Charge Description Master:

> *"I agree that I am financially responsible for all **charges** related to services provided by Sanford. I also agree to abide by Sanford's payment guidelines. I understand that these guidelines are available for my review, upon request to Sanford. I understand that if I have additional questions about my financial responsibility for Sanford's **charges**, I may contact Sanford Business Services."* [emphasis added]
>
> *Further, I understand that if I am provided health care services by a health care provider other than Sanford, while a patient within a Sanford facility or entity, I am financially responsible for all **charges** related to services provided by my health care provider. I understand that Sanford's billing statements will not include **charges** by health care providers who are independent of Sanford. I agree to abide by my health care provider's payment guidelines."* [emphasis added]

> *"I understand and agree Sanford and my attending health care provider will bill and provide necessary health information to any Payers. "Payers" are any health care insurance, private or government health plan or insurance policy that I have or another third party that I have indicated will pay the **charges** I have incurred. All Payers may make payment directly to Sanford and my attending health care provider. My signature on this form is my authorized signature for the filing of a claim and request for direct payment of benefits by any Payor to Sanford and my attending health care provider. I understand that unless Sanford or my attending health care provider have agreed with the Payer to accept payment the Payer as full payment, I am responsible to pay any **charges** not paid by the Payer. These **charges** can include but are not limited to co-pays, deductibles, co-insurance amounts and **charges** for non-covered services."* [emphasis added]

[9] Nothing in the wording of the Contract even remotely supports a conclusion that the word "charges" is a unambiguous reference to Sanford's Charge Description Master. Further, its use in difference contexts, as well as the fact that the same Contract provision is applicable to all patients, makes any such conclusion illogical and without merit.

IV. The Complaint Clearly Sets Forth The Parties Dispute Regarding The Meaning Of The Word "Charges"

[10] The existence of an ongoing dispute as to the meaning of the Contract's financial responsibility provision is crystal clear. ¶ 26 of the Complaint specifically alleges that "*an actual controversy exists between Plaintiff and Defendants, relating to their respective legal rights and duties with respect to Plaintiff's hospital visit. Plaintiff contends that he was only liable to pay the reasonable value of the treatment provided by Sanford, while Sanford billed and claimed it was entitled to receive its full Chargemaster rates.*"

V. N.D.C.C. § 32-23 Provides For The Relief Sought Herein

[11] The Complaint, in ¶ 26, states that "Plaintiff desires and is entitled to a declaration under North Dakota Century Code Chapter 32-23 as to his legal rights and duties with respect to his payment obligation to Sanford, including a determination of the construction and validity of the Financial Responsibility provision in his Contract with Sanford." This Chapter specifically grants this Court the power "*to declare rights, status, and other legal relations whether or not further relief is or could be claimed*" and further provides that *"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and may obtain a declaration of rights, status, or other legal relations thereunder."*

[12] Pursuant to North Dakota law, Plaintiff is entitled to have this Court determine the correct construction of the Statement of Financial Responsibility signed by Plaintiff during his hospital visit. As set forth in § 32-23-12 the Declaratory Judgments act is remedial and its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be construed and administered liberally.

VI. The dismissal by the Court was legal error

[13] The court below, prematurely and with no evidentiary record before it, dismissed the Complaint. In its Order, the court below misstated the Contract's reference to "payment guidelines" as a reference to "pricing guidelines," made erroneous factual assumptions

which lack evidentiary support, and ignored North Dakota's laws regarding rules of contract construction and interpretation.

[14] In granting the Motion to Dismiss, the court below gave two basic grounds for its conclusions. The first ground for its ruling is as follows:

> *"[T]here is no dispute that the Contract refers to Sanford's pricing guidelines, which are the Chargemasters, and these prices are the same for all individuals. It is only after each individual is charged according to the Chargemasters that this amount is decreased accordingly by any health coverage program benefits. While the final amount charged may vary from patient to patient, these deductions are based upon separate agreements a health coverage program has worked out with Sanford in addition to the separate agreements an individual has with a health coverage programs. As a result, no ambiguity exists in the Contract's pricing term, because the base price is the same for each individual pursuant to the Chargemaster. It is only the deductions from the base price that may vary from patient to patient. Thus, the Complaint has failed to allege facts, taken as true, presenting a justiciable controversy upon which the Court can render a declaratory judgment either terminating the controversy or removing an uncertainty."*

The second ground for its ruling is as follows:

> *[T]he Court finds persuasive the various cases Sanford cites in which courts nationwide dismissed claims similar to those asserted by Limberg, as well as dismissed claims for relief of what would have been the underlying justiciable controversy.*"

[15] Neither of these grounds have merit. In the instant action, the court below, despite introducing a term it referred to as a "base price" and then conflating the term with Sanford's Chargemaster rates, asserted that the amount a patient is financially liable to pay is the "final amount charged," which may vary from patient to patient based on separate agreements

outside of Sanford's Contract. This is exactly the position of Plaintiff, and the logic espoused by the court below regarding payment being established by outside agreements and not within the body of the Contract is precisely the interpretation that Plaintiff is seeking. The problem with the lower court lies in its conclusion that "no ambiguity exists in the Contract's pricing term because the base price is the same for each individual pursuant to the Chargemaster." Even if there was such a thing as a fixed based price, which there is not, a pricing term of the Contract is a reference to what a patient has to pay, which the court referred to as the "final amount charged." As the court below acknowledged, the "final amount charged" is not the same as the "base price," but is an amount determined by outside agreements and rate schedules set by governmental entities and negotiated agreements. Simply stated, the mistake made by the court below lies in the fact that the "financial responsibility" of a patient is to pay the "final amount charged," not the "baseline price".

[16] The second ground stated by the Court for its ruling is wrong because the Court followed a line of cases that were wrongly decided. For reasons explained hereinbelow. What the Court should have done was to follow the logic and reasoning of cases such as *Doe v. HCA Health Servs. of Tenn.*, 46 S.W.3d 191,197-8 (Tenn. 2001), *Baker County Med. Servs. v. Aetna Health Mgmt., LLC*, 31 So. 3d 842 (Fla. Dist. Ct. App. 1st Dist. 2010), *Urquhart v. Manatee Mem. Hosp.*, 2007 WL 2010761 (M.D. Fla. Mar. 13, 2007), and *Payne v. Humana Hosp. Orange Park*, 661 So. 2d 1239 (1st District Court of Appeal 1995), described below. Regardless, this Court, which reviews the Contract at issue independently, should conclude that Sanford's Contract contains an "open" price term, and that a "reasonable value" of the

services rendered to uninsured patients should be imputed.

LAW AND ARGUMENT

I. Standard of Review

[17] This action is a Class Action Complaint and Request for Declaratory Relief, seeking a contract interpretation as to Sanford's Statement of Financial Responsibility. As set forth in *Bendish v. Castillo*, 2012 ND 30, 812 N.W.2d 398, 403, this appellate Court should independently examine and construe the contract:

> *"Under North Dakota law, construction of a written contract to determine its legal effect presents a question of law, which is fully reviewable. Schwarz v. Gierke, 2010 ND 166, ¶ 11, 788 N.W.2d 302. [O]n appeal, we independently examine and construe the contract to determine if the trial court erred in its contract interpretation. General Elec. Credit Corp.of Tennessee v. Larson, 387 N.W. 2d 734, 736 (N.D. 1986)."*

II. North Dakota Statutory Law regarding contract interpretation is well established

[18] North Dakota Century Code § 9-07, entitled "Interpretation of Contract," contains rules which govern contract interpretation, none of which were mentioned or applied by the court below. Specifically, § 9-07-03, which provides that a contract is to be interpreted to give effect to mutual intention, and § 9-07-06, which provides a contract is to be interpreted as a whole, giving effect to every part if reasonably practicable, are both applicable. As shown herein, the word "charges" appears eight times in Sanford's one page Contract, and is a generic term applicable in various situations, as opposed to a reference to an unmentioned schedule of charges for services rendered. Almost without explanation, the court below concluded that there is no justiciable controversy raised by the Complaint, stating that "*there*

is no dispute that the Contract refers to Sanford's pricing guidelines, which are the Chargemasters." This statement is not supported by any evidence, and is wrong on its face, since the Contract refers to "payment guidelines," and not "pricing guidelines."

III. North Dakota's Laws of Contract Construction are well established in case law

[19] The laws of contract construction and interpretation in North Dakota are not only found in North Dakota's statutory law, but also found in numerous published opinions. A recent summary of such rules is contained in *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, 855 N.W.2d 614, 631-32, in which the court held as follows:

> *"The construction of a written contract to determine its legal effect is a question of law, which is fully reviewable on appeal. Brash v. Gulleson, 2013 ND 156, ¶ 15, 835 N.W.2d 798. "'[O]n appeal, we independently examine and construe the contract to determine if the trial court erred in its contract interpretation.'" Id. (quoting Bakken v. Duchscher, 2013 ND 33, ¶ 13, 827 N.W.2d 17). We construe contracts to give effect to the parties' mutual intent at the time the contract was formed. N.D.C.C. § 9-07-03; Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 364 (Minn. 2009). When possible, we look at the language of the contract alone to determine the parties' intent. N.D.C.C. § 9-07-04; Caldas v. Affordable Granite & Stone, Inc., 820 N.W.2d 826, 832 (Minn. 2012). We give words their plain, ordinary, and commonly understood meaning, unless contrary intention plainly appears. N.D.C.C. § 9-07-09; Baker v. Best Buy Stores, LP, 812 N.W.2d 177, 180 (Minn. Ct. App. 2012). We read the contract as a whole and give effect to each provision. N.D.C.C. § 9-07-06; Baker, at 180."*

IV. Any uncertainty in Sanford's contract must be interpreted against Sanford

[20] Another basic rule of construction is N.D.C.C. § 9-07-19, which provides that the Contract at issue must be interpreted against Sanford – "*In cases of uncertainty . . . the*

language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. . ." In the instant action, Sanford created any uncertainty that exists with regard to Contract pricing by leaving out any pricing term in its Contract, and to the extent there is uncertainty in the pricing structure for uninsured patients, N.D.C.C. § 9-07-19 holds that such uncertainty must be resolved against Sanford.

V. The Court below confused payment guidelines with pricing guidelines

[21] The lower court's statement that the Contract refers to Sanford's "pricing guidelines" is factually incorrect. The Contract reads, in pertinent part, as follows:

> "*I agree that I am financially responsible for all charges related to services provided by Sanford. I also agree to abide by Sanford's* ***payment guidelines****. I understand that these* ***guidelines*** *are available for my review, upon request to Sanford."* [emphasis added]

[22] What the Contract refers to, as shown above, is an agreement to abide by Sanford's "payment guidelines," which appears in the Contract directly after a separate agreement to be "*financially responsible for all charges related to services provided by Sanford."* These two agreements are stated separately, as shown by the use of the words "*I also agree*." Significantly, the term "payment guidelines" is not defined in the Contract, and there is no evidence whatsoever that would even support the existence of the lower court's invented term "pricing guidelines."

[23] Furthermore, an agreement by all emergency care patients to abide by Sanford's undefined "payment guidelines" cannot reasonably be interpreted as an agreement by all

patients to pay for all hospital services in accordance with Sanford's Chargemaster rates.

[24] In its Order, the Court affirmatively states that "*there is no dispute that the Contract refers to Sanford's pricing guidelines, which are the Chargemasters, and these prices are the same for all individuals.*" This statement is untrue and totally without foundation or evidentiary basis. The clear fact is that there exists an ongoing dispute over the meaning and interpretation of the Contract, and specifically whether the term "all charges" is a reference to Sanford's Chargemasters.

VI. The contract does not contain a pricing term

[25] The hospital's Contract is a promise to pay for all services rendered by the hospital, which is a "financial liability" provision, as opposed to a pricing provision. "Financial liability" provisions are quite common and found in numerous contexts, including financial liability provisions for liquidated and/or unliquidated obligations, and for events that may or may not occur in the future. The most typical example of such contract provisions are insurance policies, whereby the insurer guarantees to be financially liable for accidents which may or may not occur, and in an unknown amount at the time the policy is entered into.

[26] In the instant action, although all emergency care patients agree to be financially responsible for unknown and undetermined medical treatment costs, Sanford's Contract does not specify any specific pricing schedule for the services rendered by the Hospital or any other Health Care Provider, particularly because most patients will be covered by a government health care program such as Medicare or Medicaid, whereas other will be covered by a commercial health insurance policy, such as with Aetna or Blue Cross. An

agreement to be financially responsible does not have to fix a price, and the use of a single contract by Sanford for all patients makes it impossible to do so unless the contract itself contains different sections referencing different pricing schedules for each category of patients, which this Contract does not.

VII. The contract does not show any mutual intent by signing patient to pay for Sanford's services at Sanford's Chargemaster Rates

[27] Using standard rules of construction, *"A court's primary goal in interpreting a contract is to ascertain the mutual intentions of the contracting parties." National Bank of Harvey v. International Harvester Co.*, 421 N.W.2d 799, 802 (N.D. 1988). And as set forth in N.D.C.C. § 9-07-03, "*A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful*." Furthermore, under § 9-07-04, "*When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible*."

[28] The Order of the court below fails to discuss the intent of either party to the Contract. Regardless, there is absolutely nothing in the Contract that indicates an intention on behalf of either party to use of any specific price schedule, which is not even feasible in light of the fact that the agreement covers multiple health care providers and equally applicable to patients whose rates are determined by separate agreements with fixed rates having nothing to do with Sanford's Chargemaster. Obviously, Sanford was well aware of the fact that the agreement it drafted was designed to be signed by all patients, including Medicare, Medicaid, Insured and Uninsured patients, since specific Contract provisions refer to the Centers for Medicare and Medicaid Services (CMS), and other provisions refer to insurance co-pays and

deductibles. Thus, looking at the Contract as a whole, it can't reasonably be argued that parties to the contract shared a mutual intent to be bound by Sanford's Chargemaster rates.

VIII. The facts before this Appellate Court dictate that Sanford's contract contains an open price term

[29] The facts before this Appellate Court, none of which are in dispute, are simple and straightforward:

1) All emergency care patients are provided the same Contract for signature, regardless of whether they are Medicare, Medicaid, Insured, or Uninsured patients.

2) The Contract contains a single financial responsibility provision that is equally applicable to all emergency care patients.

3) The pricing schedules for Medicare patients, Medicaid patients, and Insured patients are contained in separate agreements outside of the body of the Contract.

4) Medicare patients, Medicaid patients, and Insured patients are financially responsible for the "final amount charged," which is based on the pricing schedules of separate agreements outside the body of the Contract and which may vary from patient to patient.

5) Uninsured patients have no outside agreements containing pricing schedules for which they are financially responsible.

6) Under North Dakota Law, where a Contract for services lacks a pricing term, the law imputes a pricing term equal to the reasonable value of the services.

IX. Multiple cases support the conclusion that hospital agreements with a generic pricing term applicable to all patients have an "open" price term

[30] The court below cites to several poorly reasoned cases, while at the same time

ignoring several well thought out cases raised by Plaintiff in which hospital agreements, similar to that in the instant action, were found to contain an "open" price term. A few of the many opinions supporting the finding of an "open" pricing term in a hospital emergency room contract are described below.

[31] In *Doe v. HCA Health Servs. of Tenn.*, 46 S.W. 3d 191,197-8 (Tenn. 2001), the Supreme Court of Tennessee considered a hospital's admission agreement in which the patient promised to pay the hospital's "charges," without specifying where those charges could be found. Noting that the admission agreement "did not provide any reference to a document, transaction or other extrinsic facts by which the price could be determined and the meaning of the term 'charge' made clear," the court found this to be an indefinite price term. Since the agreement did not adequately define the charges, the hospital was entitled only to a quantum meruit recovery for the reasonable value of its services.

[32] In *Baker County Med. Servs. v. Aetna Health Mgmt., LLC,* 31 So. 3d 842 (Fla. Dist. Ct. App. 1st Dist. 2010) the First Appellate District of Florida held that the phrase "usual and customary charges" does not mean a hospital's Chargemaster rates, but refers to the fair market value of the services provided: namely the price that a willing buyer would pay and a willing seller would accept in an arm's-length transaction.

[33] In *Urquhart v. Manatee Mem. Hosp.*, 2007 WL 2010761 (M.D. Fla. Mar. 13, 2007) the U.S. District Court for the Middle District of Florida held that an agreement "to pay the account of the hospital/provider/physician in accordance with the regular rates and terms of the hospital/provider/physician" was an open pricing agreement because it did not specify on

its face an exact price for the services provided.

[34] In *Payne v. Humana Hosp. Orange Park*, 661 So. 2d 1239 (1st District Court of Appeal 1995), the Court held that "A patient may not be bound by unreasonable charges in an agreement to pay charges in accordance with 'standard and current rates' . . . When a contract fails to fix a price furthermore, a reasonable price is implied.

X. Sanford's contract contains an open price term

[35.] Although the court below dismissed the instant action, the basis for dismissal is refuted by the Court's acknowledgment that an emergency care patient signing Sanford's Contract is only responsible for payment of the "final amount charged." Further, the Court not only clarifies that the "final amount charged" is the pricing term for Sanford's services, but further states that such amount is not calculated at Sanford's Chargemaster rates, and "may vary from patient to patient. . . based upon separate agreements." The court tried unconvincingly to explain the inconsistency in its Order by asserting that a "base price" is applicable to all patients. However, even if this is true, which it is clearly is not for Medicare and Medicaid rates, the price a patient must pay is the "final amount charged" as set by outside agreements and not the "base price." Since the Court clearly acknowledged that the "final amount charged" may vary from patient to patient, and is determined on the basis of separate agreements not contained within the Contract, the Court is essentially agreeing with Plaintiff's position that the Contract leaves the price term "open," and that a patient's payment is either set forth in separate agreements or not at all. In any case, the amount that any emergency care patient must pay is not specified or fixed within the body of the Contract.

[36] Further, to the extent that the Court's analysis refers to the Chargemaster as the "base price" from which all discounts and deductions are taken, even this analysis is demonstrably wrong in the case of Medicare and Medicaid patients, whose rates are based on a totally separate pricing methodology known as DRG Coding.3 Thus, there is no basis for the conclusion by the court below that "*[N]o ambiguity exists regarding the price term of the Contract, because the base price is the same for each individual pursuant to the Chargemasters."*

XI. North Dakota Law And The Restatement (Second) of Contracts both recognize the existence of contracts which have an "open" price term

[37] While a contract for goods or services normally includes a price term, North Dakota recognizes that there are times when a document, intended to be a contract, fails to include a price term. In the context of the sale of goods, North Dakota law, N.D.C.C. § 41-02-22, covers this situation, and to the extent the hospital is selling goods as well as services, North Dakota law sets the price term for a contract which does not include a price term as the "reasonable price."

[38] The Restatement (Second) of Contracts also supports Plaintiff's "reasonable value of services" analysis when a price term is left "open". As set forth in § 204, entitled Supplying an Omitted Essential Terms, *"When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their*

3 Medicare approved rates are based on a charging system known as Diagnostic Relating Group coding, and pricing for Medicare patients have nothing to do with Chargemaster billing, which is based on accumulating the prices for each individual item of treatment and services.

rights and duties, a term which is reasonable in the circumstances is supplied by the court."

XII. A "reasonable price" term applies equally to a contract for services

[39] North Dakota cases have also been consistent in fixing the price for services as the reasonable value of such services when no price was fixed within the contract itself. For example, in *Marshall v. Hocking*, 249 N.W. 111, 63 N.D. 546, 548 (1933), the appellate court upheld the proposition that "if the contract was oral and no price fixed as claimed by the plaintiff, then he is entitled to recover the reasonable value of such services." In *Henderson v. Scott*, 72 N.D. 616, 618 (1943), the court held that "If defendant Scott employed the plaintiff to furnish medical services for him he must pay the reasonable value of these services when no express agreement was made as to fees. . ." In *Myra Found. v. Harvey*, 100 N.W.2d 435, 438 (N.D. 1959), the court held that "One who performs work or services for another at his request is ordinarily entitled to recover the reasonable value of his services." A similar conclusion was reached in *In re Estate of Lutz*, 1997 ND 82, 63 N.W.2d 90, 94 which held that "Ordinarily, someone who performs substantial services for another without an express agreement for compensation becomes entitled to the reasonable value of the services. These cases all clearly articulate a well established principle under North Dakota law that where a contract fails to include an express agreement for compensation, the party providing services is entitled to the reasonable value of the services.

XIII. The Complaint must be construed in the light most favorable to the Plaintiff and the dismissal reversed

[40] Well established North Dakota law holds that the complaint is to be construed in the light most favorable to the plaintiff, and the allegations of the complaint must be accepted as

true. The motion for dismissal of the complaint should be granted only if it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted. (*Rose v. United Equitable Ins. Co.*, 2001 ND 154, ¶10, 632 N.W. 2d 429. In essence, a motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *McLean v. Kirby Co.*, 490 N.W.2d 229, 232 (N.D. 1992)

XIV. The instant action is not similar to any of the cases cited by the Court below

[41] The instant action is unique, and readily distinguishable from any of the cases cited by the court below, in that it sets forth only a single cause of action seeking a Declaratory Judgment as to the meaning of the word "charges" contained in Sanford's one page agreement, involves parties not related to any other case, and involves the interpretation of a Contract which is exclusive to Sanford.

[42] Of particular significance is that this action presents an argument not raised or discussed in any other published cases, but which would refute the conclusions drawn in cited cases where nebulous terms such as "all charges" or "regular rates" were found to be an unambiguous reference to a hospital's Chargemaster rates. A clear, well thought out ruling by this court will not only correct the erroneous decision of the court below, but would assist other court's by shining light on the entire contract interpretation dilemma.

XV. None of the cases cited by the Court contain a single stand-alone cause of action for declaratory judgment, concern the same contract or parties, or contain any analysis as to rules of contract interpretation

[43] The court below stated that it finds persuasive cases from foreign jurisdictions cited by Defendant, including *Allen v. Clarian Health Partners*, *Shelton v. Duke Univ. Health*

System, Nygaard v. Sioux Valley Hospitals & Health System, DiCarlo v. St. Mary Hosp., Banner Health v. Medical Sav. Ins. Co., Morrell v. Wellstar Health System, Inc., and *Holland v Trinity Health Care Corp*. According to the Court, *"While [Plaintiff's] argument is technically accurate that the language in each individual contract in these cases is not the same, the reasoning of these cases all stand for the same proposition that where a hospital contract does not specify an exact amount to be paid but references an amount to be determined by a hospital's pricing guidelines, the price term is sufficiently definite and unambiguous."*

[44] The Court's conclusion that Sanford's contract contains a "sufficiently definite and unambiguous" price term, is based on a lack of critical analysis and the decision of the lower court to follow wrongly decided, non-precedential cases which should be rejected outright. The Order of the court below should be reversed.

[45] First, established rules of contract construction require that a document must be looked at as a whole, which the court below failed to do. Had it done so, the court would have recognized and indicated that the word "charges" actually appears eight different times within the body of the Contract, and refers not only to the charges of Sanford, but to the charges of other Health Care Providers, and to the charges for insurer co-payments and deductibles.

[46] Second, the court below accepted the reasoning of ill thought out decisions when reaching its conclusion that "*the reasoning of these cases all stand for the same proposition that where a hospital contract does not specify an exact amount to be paid but references an*

amount to be determined by a hospital's pricing guidelines, the price term is sufficiently definite and unambiguous." The basic problem in all of the cases cited by the court below is that there is no direct reference of a hospital's Charge Description Master in any of them, no analysis of the applicable hospital admission agreements as a whole, no indication of an intent by any signing patients to be bound by a specific pricing schedule, and most importantly, no indication that the admission agreement was not applicable to all emergency patients, including insured and uninsured patients alike. Thus, each of the opinions suffers from the exact same analytical deficiencies as contained in the Order of the court below.

XVI. *DiCarlo* was wrongly decided and it's superficial logic should be rejected

[47] The court below cites extensively from *DiCarlo v. St. Mary Hosp.*, 530 F.3d 255 (3rd Cir. 2008), saying that the case reflects the basic premise at the heart of all the cited cases. *DiCarlo* is the quintessential opinion for this case to consider, since it is superficial and poorly reasoned, but nevertheless relied on by the court below.

[48] The portion of *DiCarlo* that is directly quoted in the Court's Order and pertinent to the instant action is as follows:

> *The price term "all charges" is certainly less precise than price term of the ordinary contract for goods or services in that it does not specify an exact amount to be paid. It is, however, the only practical way in which the obligations of the patient to pay can be set forth, given the fact that nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what ails him or her. Besides handing the patient an inches-high stack of papers detailing the hospital's charges for each and every conceivable service, which he or she could not possibly read and understand before agreeing to treatment, the form contract employed by a hospital is the only way to*

> *communicate to a patient the nature of his or her financial obligations to the hospital.*

[49] The problems with the *DiCarlo* opinion are apparent on its face. In that case, the patient went to St. Mary's Hospital, suffering from an increased heart rate. He did not have health insurance, and did not qualify for Medicare or Medicaid. As a condition of treatment, the patient was required to sign a form document which guaranteed payment of unspecified charges. The hospital's admission agreement in *DiCarlo*, which also uses the words "all charges," reads, in pertinent part, as follows:

> *I hereby consent to the administration of such treatment, medication, or anesthesia and the performance of such surgery as deemed necessary or advisable on myself or my minor dependent. I also guarantee payment of all charges and collection expenses for services rendered, and grant permission for release of information to my insurance company. I authorize payment directly to the hospital of the hospital benefits otherwise payable to me.*

[50] Similar to the words of the admission agreement in the instant action, the hospital admission agreement in *DiCarlo* contains a payment guarantee for *"all charges,"* including the charges for treating physicians, anesthesiologists, and surgeons. Further, its reference to "my insurance company" indicates the contract is applicable to both insured and uninsured patients.

[51] The justification given in *DiCarlo* for interpreting the term "all charges" as a pricing term is that the use of such term "*is . . the only practical way in which the obligations of the patient to pay can be set forth, given the fact that nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what ails him or her."* While

this argument sounds plausible on the surface, it is a lame excuse and total nonsense. The reason given in *DiCarlo* as to why the use of the term "all charges" is the "only practical way in which the obligations of the patient to pay can be set forth," is that "*nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what ails him or her.*" The statement, however, is equally applicable to every patient that comes to the emergency room, and every bit as applicable to Medicare, Medicaid, and Insured patients, who are all subject to clearly fixed pricing schedules, even that "nobody knows their condition or what treatments they will receive when they come to the emergency room." In essence, the statement in *DiCarlo* that nobody knows about the condition or necessary treatment of a patient presenting at an emergency room facility is equally applicable to all patients, and is completely irrelevant as to any need to define hospital pricing with a nebulous term such as "all charges." Further, it does nothing to support a conclusion that the term "all charges" is an unambiguous reference to the hospital's Chargemaster rates, and it is most likely an excuse thought up by the hospital's legal counsel.

[52] Further, *DiCarlo* also suffers from the same deficiency as the Order of the court below in that the majority of St. Mary's emergency room patients are not required to pay for services at its Chargemaster rates. As set forth in *DiCarlo*:

> *St. Mary's has a uniform set of charges (casually known as the "Chargemaster") that it applies to all patients, without regard to whether the patient is insured, uninsured, or a government program beneficiary. As Plaintiff in his complaint and in his briefs recites, St. Mary's accepts a variety of discounted payments in different situations. It negotiates differing discounts with some managed care payors and insurance companies. It accepts discounted payments if the*

patient is covered by a government program that legislatively imposes discounts.

While *DiCarlo* mentions "accepting discount payments," the fact is that Medicare, Medicaid, and Insured patients (i.e., the majority of patients) are all subject to fixed price schedules (either negotiated or legislatively imposed) other than St. Mary's Chargemaster rates. As with the instant action, St. Mary's contract does not mention Chargemaster rates, and interpreting St. Mary's contract as an unambiguous reference to its Chargemaster rates is absurd in light of the fact that the vast majority of patients are required to pay on the basis of separate pricing schedules, not Chargemaster rates. Referring to an outside pricing schedule as a "discounted rate" is of no consequence. It would be ludicrous to suggest that the pricing term for Medicare patients is "discounted Chargemaster rates," as opposed to simply saying that the pricing term for Medicare patients is Medicare rates.

[53] Simply put, where a hospital chooses to use an admission agreement which is equally applicable to all patients and which merely provides a generic payment liability term such as "all charges," the agreement cannot logically be interpreted as requiring payment for all patients at Chargemaster rates, since the majority of signing patients will undoubtedly be subject to rate schedules contained in agreements outside of the admission agreement.

XVII. Many well written opinions support the finding of an "open" price term in similar cases

[54] Although the court below failed to mention any of the cases cited by Plaintiff in which a hospital's admission agreement was found to contain an "open" price term, there are, in fact, many such cases. For example, in *Doe v. HCA Health Servs. of Tenn.*, 46 S.W. 3d 191,197-8 (Tenn. 2001), the Supreme Court of Tennessee considered a hospital's admission

agreement in which the patient promised to pay the hospital's "charges," without specifying where those charges could be found. Noting that the admission agreement "did not provide any reference to a document, transaction or other extrinsic facts by which the price could be determined and the meaning of the term 'charge' made clear," the court found this to be an indefinite price term. Since the agreement did not adequately define the charges, the hospital was entitled only to a quantum meruit recovery for the reasonable value of its services. In *Urquhart v. Manatee Mem. Hosp.*, 2007 WL 2010761 (M.D. Fla. Mar. 13, 2007) the U.S. District Court for the Middle District of Florida held that an agreement *"to pay the account of the hospital/provider/physician in accordance with the regular rates and terms of the hospital/provider/physician"* was an *open pricing agreement* because it did not specify on its face an exact price for the services provided. In *Baptist Health v. Hutson*, 382 S.W. 3d 662, 2011 Ark. 210 (Ark. 2011), the Supreme Court of Arkansas upheld certification of a class consisting of uninsured patients who signed admission forms obligating them to pay the hospital's "regular rates and terms," but were subsequently assessed charges based on the hospital's "master charge catalog rate." In *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 500 (2009) *(*quoting *Franklin v. Scripps Health*, San Diego Co. Super. Ct. No. IC859468), Judge Steven Denton entered an order on June 26, 2007, granting class certification to a class of over 60,000 uninsured emergency care patients in a case where the plaintiff alleged that Scripps Health charged its uninsured patients unreasonable and unconscionable rates for medical treatment. In *Turner v. Legacy Health System*, 2006 WL 657176 (Or. Cir., unpub. 2006), the Circuit Court of Oregon certified a class action involving

allegations of breach of contract and unfair practices, brought by uninsured patients who were charged the defendant hospital's highest rates under contracts that the Court found to have "open" prices. In *Baker County Med. Servs. v. Aetna Health Mgmt., LLC*, 31 So. 3d 842 (Fla. Dist. Ct. App. 1st Dist. 2010) the First Appellate District of Florida held that the phrase "usual and customary charges" does not mean a hospital's Chargemaster rates, but refers to the fair market value of the services provided: namely the price that a willing buyer would pay and a willing seller would accept in an arm's-length transaction. In *Payne v. Humana Hosp. Orange Park*, 661 So. 2d 1239 (Fla. Dist. Ct. App. 1st Dist. 1995), the court ruled that where patients "would have to review an allegedly unavailable, lengthy, coded document to know the contract price," they would not be not bound by allegedly unreasonable charges in a hospital's Chargemaster. And in *Quinn v. BJC Health System dba BJC Healthcare*, 364 F. Supp. 2d 1046 (Mo. 2007), the Missouri Circuit Court certified an uninsured pricing class, consisting of patients who entered into form contracts which required them to pay unspecified, undocumented, and undetermined charges as a condition of receiving medical treatment or services (excluding those who negotiated the charges in advance) and who did not receive a negotiated or charity discount or waiver but were charged the full Chargemaster rates.

[55] While it would make little sense to simply count the number of cases on each side of the fence in order to determine which interpretation of a generic contract term is correct, the logic expressed in cases such as *DiCarlo* (or in the Order of the court below) creates an absurdity for about 90% of the patients presenting at the hospital's emergency room. As

such, cases such as *DiCarlo* should be rejected out of hand. The far better reasoned opinion is found in the ruling of the Supreme Court of Tennessee, described previously, wherein the court held that when an admission agreement does not provide any reference to a document, transaction or other extrinsic facts by which the price could be determined and the meaning of the term 'charge' made clear," the price term is indefinite. This Court should reach a similar conclusion.

CONCLUSION

[56] The instant action consists of a single cause of action for Declaratory Judgment seeking a determination as to the meaning of the financial liability provision in Sanford's form Contract over which there is an ongoing dispute. The court below, in granting the motion, misstated the wording of the Contract at issue, failed to follow North Dakota's Chapter 9-07 concerning the interpretation of contracts, relied on poorly decided foreign cases while ignoring cases in which hospital agreements were found to have an "open" price term, and provided a logical explanation that says a patient is responsible for the "final amount charged," which is all that Plaintiff herein really seeks. As a result, this Court should review the Document on a de novo basis, reverse the lower court's Order of Dismissal, and find that Sanford's Contract contains an "open" price term requiring the imputation of a "reasonable value" for services rendered. Such a ruling is essential for thousands of patients who remain subject to existing collection and/or negative credit reports based on excessive Chargemaster rates, and who would greatly benefit from such a determination because they otherwise lack any realistic means to defend themselves against the excessive Chargemaster

rates they have been billed.

Respectfully submitted this 23rd day of February, 2016.

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CERTIFICATE OF COMPLIANCE

[57] The undersigned, as the attorney representing Appellant , Dustin Limberg and the author of this Brief hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,944 words from the portion of the brief entitled “Statement of the Case " through the signature block. This word count

was done with the assistance of the undersigned's computer system, which also counts abbreviations as words.

DATED this 23rd day of February, 2016.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Limberg, on behalf of himself and all others similarly situated,	)	
	)	**Supreme Court Case No. 20150348**
Appellant,	)	
	)	
vs.	)	
	)	
	)	
Sanford Medical Center Fargo, a North Dakota Corporation, Sanford Health Network North, a North Dakota Corporation, and Sanford, a North Dakota corporation; and does 1 Through 25, inclusive,	)	
	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF CASS)

I certify that I served the following documents on date noted below:

Brief of Appellant Dustin Limberg; Appendix of the Brief of Appellant Dustin Limberg

by placing true and correct copies thereof in an envelope addressed to the following people at the address stated below, which is the last known address of the addressee as follows:

W. Todd Haggart
Vanessa L. Anderson
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389

and depositing the same, with postage prepaid, in the United States mails for delivery by the U.S. Post Office Department as directed on the envelope.

Dated this 23rd day of February, 2016.

Fran Lundblad

Fran Lundblad

Subscribed and sworn to before me this 23rd day of February, 2016.

Darcie Wahl

Notary Public

DARCIE WAHL
Notary Public
State of North Dakota
My Commission Expires Mar. 23, 2021

20150348
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 26, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Limberg, on behalf of himself and all others similarly situated,	)	
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Appellant,	)	
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	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF CASS)

I certify that I served the following documents on date noted below:

Brief of Appellant Dustin Limberg (Corrected); Appendix of the Brief of Appellant Dustin Limberg (Corrected)

by placing true and correct copies thereof in an envelope addressed to the following people at the address stated below, which is the last known address of the addressee as follows:

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and depositing the same, with postage prepaid, in the United States mails for delivery by the U.S. Post Office Department as directed on the envelope.

Dated this 26th day of February, 2016.

Fran Lundblad

Fran Lundblad

Subscribed and sworn to before me this 26th day of February, 2016.

Denise M. Brinkman
Notary Public

DENISE M. BRINKMAN
Notary Public
State of North Dakota
My Commission Expires Sept. 17, 2020

20150348
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 29, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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	)	**Supreme Court Case No. 20150348**
Appellant,	)	
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	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF CASS)

I certify that I served the following documents on date noted below:

Brief of Appellant Dustin Limberg (Corrected title page); Appendix of the Brief of Appellant Dustin Limberg (Corrected title page)

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and depositing the same, with postage prepaid, in the United States mails for delivery by the U.S. Post Office Department as directed on the envelope.

Dated this 29th day of February, 2016.

Fran Lundblad

Fran Lundblad

Subscribed and sworn to before me this 29th day of February, 2016.

Notary Public

DARCIE WAHL
Notary Public
State of North Dakota
My Commission Expires Mar. 23, 2021